UNITED STATES DISTRICT COURT
SOURTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

GLADIS MORALES AGUILAR	§	
Plaintiff	§	
v.	§	
	§	CIVIL ACTION NO. 1:16-cv-0048
UNITED STATES OF AMERICA	§	
Defendant	§	

DEFENDANTS' ADVISORY REGARDING ITS MOTION TO DISMISS

Defendant United States of America hereby submits this Advisory Regarding its Motion to Dismiss. In support thereof, Defendant states as follows:

PROCEDURAL BACKGROUND

1. Plaintiff brought this Federal Tort Claims Act ("FTCA") action against Defendant for damages she allegedly sustained while in detention at a Customs and Border Protection facility in the Rio Grande Valley, between March 26, 2013 to April 2, 2013. Dkt. No. 1 at 1.

2. Plaintiff filed this suit in the United States District Court for the Eastern District of Virginia-Alexandria Division ("EDVA"), under Civil No. 1:15-cv-986. Dkt. No. 1.

3. Defendant filed its motion to transfer or motion to dismiss on January 19, 2016. Dkt. Nos. 8, 9. The EDVA district court scheduled Defendant's motion for hearing on February 25, 2016. *See* Jan. 20, 2016 CM/ECF minute entry. Plaintiff filed her opposition brief on February 5, 2016. Dkt. Nos. 15, 16. Defendant filed its reply brief on February 16, 2016. Dkt. No. 19.

4. Plaintiff filed a motion for leave to file sur-reply on February 25, 2016. Dkt. Nos. 20, 21. Defendant filed its opposition to Plaintiff's motion for leave that same day. Dkt. No. 22. Plaintiff also filed a notice of dismissal as to her "abuse of process" claim on February 25, 2016, which the EDVA district court granted that same day. Dkt. Nos. 23, 24.

5. The EDVA district court granted Defendant's motion "solely as to the transfer issue" on February 26, 2016, ordering that this action be transferred to the United States District Court for the Southern District of Texas ("SDTX"). Dkt. No. 28. The EDVA district court also ordered that Plaintiff's motion for leave to file sur-reply was denied as moot. *Id.*

6. After this case was transferred to the SDTX, this Court issued an order setting conference on March 8, 2016, ordering, *inter alia*, that the parties file a joint case management plan stating their position as to whether they believed additional briefing was required as to Defendant's motion to dismiss. *Id.* at 2.

7. The parties filed their joint case management plan on May 23, 2016, and explained therein that they did not believe additional briefing was required, and that the Court may rule on Defendant's motion to dismiss as briefed. Dkt. No. 35 at 9.

8. The parties filed their joint motion to stay discovery and all scheduling order deadlines, or alternatively, joint motion for status conference on October 5, 2016. Dkt. No. 42. The Court issued an order granting the joint motion and setting this case for a status conference on October 12, 2016. Dkt. No. 43.

DEFENDANT'S ADVISORY

9. The Court held a status conference with the parties on October 12, 2016. At the said conference, the Court asked Defendant's counsel to clarify what effect Plaintiff's voluntary dismissal of her "abuse of process" claim—which the EDVA district court ordered dismissed—had on Defendant's motion to dismiss. Defendant's counsel clarified that its Rule 12(b)(1) jurisdictional arguments were targeted to Plaintiff's "abuse of process" claim. Accordingly, given that Plaintiff's "abuse of process" claim has now been dismissed, the only live arguments in Defendant's motion to dismiss are that Plaintiff's remaining claims should be dismissed under

Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Per the Court's instruction, Defendant files this advisory.

10. The Court also asked Plaintiff's counsel at the status conference if she intended to keep the factual allegation contained in Paragraph 60(e) of Plaintiff's Complaint regarding her intentional infliction of emotional distress ("IIED") claim, given that she had agreed to voluntary dismissal of her "abuse of process" claim. The factual allegation at issue in Paragraph 60(e) states: "The CBP agents acted in an extreme and outrageous manner during Ms. Morales's detention when they intentionally and/or recklessly: . . . falsely stated on DHS forms that Ms. Morales did not claim a fear of returning to El Salvador, refused to refer her to an asylum officer as required by law, and issued her an Expedited Order of Removal." Pl's Compl. ¶ 60. Plaintiff's counsel responded that she wished to keep this factual allegation in Paragraph 60(e) in the Complaint.

11. To the extent Plaintiff seeks to reframe her "abuse of process" claim as an IIED claim based upon the allegation in Paragraph 60(e) in the Complaint, the Court lacks subject matter jurisdiction over the IIED claim—or any claim wherein Plaintiff incorporates the factual allegations of Paragraph 60(e)—for the same reasons that the Court lacked jurisdiction over the "abuse of process" claim.[1] First, this Court lacks jurisdiction under the FTCA to review any allegations of false statements on the part of CBP officers pursuant to 28 U.S.C. § 2680(h), which provides that the United States retains its sovereign immunity for any "claims arising out of . . . misrepresentation [or] deceit." Second, 8 U.S.C. § 1252(g) divests the Court of jurisdiction to entertain "any cause or claim by . . . any alien arising from the decision by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this

[1] *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Johnston v. United States*, 85 F.3d 217, 218 (5th Cir. 1996) ("It is well-settled that subject matter jurisdiction can be raised at any time or even *sua sponte* by the court.").

chapter." Finally, 8 U.S.C. § 1252(a)(2)(A)(i) divests courts of jurisdiction to review any "cause or claim arising from or relating to the implementation or operation of removal pursuant to section 1225(b)(1) [the expedited removal statute.]").[2]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 13, 2016 a copy of the foregoing document was sent by electronic mail through the District Clerk's electronic notification system to Plaintiff's counsel.

s/ Christopher D. Pineda
CHRISTOPHER D. PINEDA
Assistant United States Attorney

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[2] *See United States v. Herrera-Orozco*, CRIM.A. C-11-542, 2011 WL 3739160, at *1–2 (S.D. Tex. 2011) ("[I]n enacting the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress significantly limited the power of federal courts to review § 1225(b)(1) expedited-removal orders. Section 1252(e)(2) provides: Judicial review of any determination made under [8 U.S.C. §] 1225(b)(1) . . . is available in habeas corpus proceedings, but shall be limited to determinations of-(A) whether the petitioner is an alien; (B) whether the petitioner was ordered removed under such section; and (C) whether petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee ... or has been granted asylum.") (*citing Brumme v. I.N.S.*, 275 F.3d 443, 447 (5th Cir. 2001)). Accordingly, the Court lacks jurisdiction to review the expedited removal proceedings outside the limited scope authorized by 1252(e).